

EVIDENTIARY HEARING
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:

Application for Certification for)	Docket No.
The San Joaquin Valley Energy)	01-AFC-22
Center by Fresno County)	
_____)	

CALIFORNIA ENERGY COMMISSION

HEARING ROOM B

1516 NINTH STREET

SACRAMENTO, CALIFORNIA

TUESDAY, DECEMBER 23, 2003

1:34 p.m.

Reported by
Peter Petty
Contract No. 170-01-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

Commissioner John Geesman, Associate Member

STAFF PRESENT

Major Williams, Jr., Hearing Officer
Paul Kramer, Esq., Staff Counsel
Matt Trask, Project Manager
Margret Kim, Public Advisor
Keith Golden
Will Walters, Aspen Environmental Group
(via phone)

APPLICANT

Jeffery D. Harris, Esq.
Ellison, Schneider & Harris LLP
Michael Argentine, Calpine
Jim McLucas, Calpine
Gary Rubenstein, Sierra Research
John Carrier, CH2M Hill
Cruz Ramos, City of San Joaquin

PUBLIC

Bob Sarvey (via phone)
James Benelli
Tobin Dean
Shawn Smith, Northern California Carpenters
Regional Council

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P R O C E E D I N G S

1:34 p.m.

HEARING OFFICER WILLIAMS: Commissioner

Geesman is here. Commissioner Rosenfeld, our
Presiding Member, is absent. We also have her our
Public Advisor, Margret Kim. welcome, Ms. Kim.
Do you have any remarks at this point?

MS. KIM: I think I was able to provide
the blue cards -- I've already provided the blue
cards.

HEARING OFFICER WILLIAMS: Yes, we have
the blue cards here. We also have several callers
on the line -- at least I hope we do. Mr. Sarvey,
are you there?

MR. SARVEY (via phone): Yes I am.

HEARING OFFICER WILLIAMS: And Mr.
Walters, are you there?

MR. WALTERS (via phone): Yes I am.

HEARING OFFICER WILLIAMS: Okay, good.
Let me raise the volume here. Let's see -- we
also have what appears to be members of the
public. Do we have a microphone they can use?
Would you like to come up, sir and ma'ams, and
introduce yourselves?

MR. BENELLI: My name is James Benelli.

1 I'm here as a concerned citizen.

2 HEARING OFFICER WILLIAMS: Okay, thank
3 you sir. Ma'am?

4 MS. DEAN: My name is Tobin Dean. I'm
5 here also as a concerned citizen of Fresno,
6 California and Fresno County.

7 HEARING OFFICER WILLIAMS: Okay, thank
8 you. I believe we have your cards as well. One
9 more person?

10 MR. SMITH: My name is Shawn Smith, and
11 I'm a business representative for the Carpenter's
12 Union in Fresno/Tulare County.

13 HEARING OFFICER WILLIAMS: And I take it
14 you are here in support of the project?

15 MR. SMITH: Yes sir.

16 HEARING OFFICER WILLIAMS: Okay, thank
17 you. I'm the Hearing Officer, Major Williams, Jr.
18 And again, to my right is Commissioner John L.
19 Geesman, who will be presiding at this hearing. I
20 note that the parties are present. I see the
21 Applicant's counsel, Jeff Harris. Mr. Argentine
22 is here, and several others of Applicant's team.

23 Would you all like to introduce
24 yourselves for the record?

25 MR. ARGENTINE: My name is Mike

1 Argentine, I'm project development manager for the
2 Applicant.

3 MR. HARRIS: Jeff Harris, counsel for
4 the Applicant.

5 MR. RUBENSTEIN: Gary Rubenstein with
6 Sierra Research Air Quality Consultants for the
7 Applicant.

8 MR. MCLUCAS: Jim McLucas, project
9 engineer for the Applicant.

10 MR. CARRIER: John Carrier, CH2M Hill,
11 project manager for consultant and the Applicant.

12 HEARING OFFICER WILLIAMS: Okay, thank
13 you. I note that Mr. Paul Kramer, staff counsel,
14 is here, as well as Mr. Matthew Trask, project
15 manager. There appears to be no Intervenors here.
16 I don't see Mr. Freitas, or CURE for that matter.
17 But CURE hasn't participated at all to this point.

18 And I don't see any of the interested
19 jurisdictions that participated either. We have
20 already introduced the members of the public who
21 are here. For their benefit I'd say we're going
22 to go through the topic areas where there's some
23 remaining dispute, or some changes that have been
24 proposed.

25 At the end of each topic area, if you'd

1 like, you can come forward and speak to that
2 topic. And at the end you can come forward and
3 give your opinion again, however you want to do
4 it. We want to make sure that we get your input
5 at any point.

6 Now, there are a few housekeeping
7 matters that we need to address. First I'd say,
8 after our conference today it is the Committee's
9 intent to put the matter before the full Energy
10 Commission at its scheduled Business Meeting on
11 Wednesday, January 14th, 2004. The Business
12 Meeting will begin at 10:00 a.m., and we'll be
13 putting out a notice to that effect.

14 There is another housekeeping matter
15 that we need to deal with, and that's staff's
16 motion to reopen the record to introduce a
17 supplemental analysis on reconductering. Is it
18 possible that we can get a stipulation to admit
19 the document so that we don't have to deal with it
20 further?

21 MR. HARRIS: Thank you, Mr. Williams.
22 We had offered to have the document accepted as
23 public comment, so the record would not have to be
24 reopened. I haven't had a chance to have staff's
25 reaction to that. But that would be, in our view,

1 a compromise position.

2 Barring that, we would continue to
3 object to the motion to continue to reopen the
4 record.

5 HEARING OFFICER WILLIAMS: What about a
6 stipulation -- they're opposed to receiving it as
7 public record -- or public comment, excuse me. It
8 certainly, I believe, would save time if we could
9 stipulate the document's admissibility without the
10 need for further addressing it.

11 MR. HARRIS: Point of clarification.
12 Did the notice for the meeting allow us to reopen
13 the record at this hearing, and accept the
14 document at this hearing?

15 HEARING OFFICER WILLIAMS: Yes.

16 MR. HARRIS: It does. Give us just a
17 moment.

18 HEARING OFFICER WILLIAMS: Okay.

19 MR. HARRIS: Mr. Williams, our
20 recollection is that it was properly noticed, and
21 in the interest of moving things along we would
22 accept it into the record at this point.

23 HEARING OFFICER WILLIAMS: Okay. It
24 will come in as the next in order, without the
25 need for any further action on that. As I

1 indicated then to the -- and thank you, Applicant,
2 for that stipulation -- as I indicated earlier to
3 the public participants, we will not revisit the
4 uncontested topics unless there is a specific
5 request to do so.

6 And it appears as if we have comments
7 that cover about eight or nine different areas.
8 Some of them are very minor. So we'll just go
9 through the topics in order as they appear in the
10 Presiding Member's Proposed Decision, if that's
11 okay. And certainly -- Applicant, do you have an
12 opening statement or something that you would like
13 to present?

14 MR. HARRIS: No, we're prepared to go
15 through each subject matter, unless you'd like to
16 hear from us on differently.

17 HEARING OFFICER WILLIAMS: Okay. Fine.
18 I note on the introduction that Applicant notes
19 that we should indicate that the Applicant is San
20 Joaquin Valley Energy Center, although it wasn't
21 San Joaquin Valley Energy Center at the time the
22 AFC was submitted. But, is there any objection to
23 that, staff?

24 MR. KRAMER: Oh, no.

25 HEARING OFFICER WILLIAMS: Okay, so

1 we'll do that. For compliance monitoring and
2 closure, Com 8, staff is recommending a new
3 provision. Applicant, do you have any comments on
4 that?

5 MR. HARRIS: Yes we do. First off, the
6 staff has suggested that this new requirement is a
7 new federal security requirement. And I'm
8 actually not quite sure specifically what that
9 references to here. I don't know what they
10 consider to be the new security requirement. If
11 staff might help elucidate on that later --.

12 We need to take a look at this language.
13 It's different than what was in the final staff
14 assessment that staff's proposing. This is yet
15 another version of Com 8. I've been involved in
16 five projects in the last year, I think, and
17 they've all had different versions of Com 8. This
18 version that I see now, I don't recall being in
19 any of those other cases.

20 This is an area that I think really
21 screams out for consistency among all the
22 Commission projects, all certified projects. We
23 still believe that this is probably the proper
24 subject for a rulemaking down the road, or the
25 Commission to have really one uniform set of

1 standards here.

2 Calpine has several projects with
3 various versions of this Com 8, and frankly it's
4 becoming an administrative hassle to try and
5 figure out what each one of these different
6 projects require. If you wanted to replace this
7 new version of Com 8 with something else that's
8 been approved recently, we would prefer to have
9 the Inland Empire version of Com 8.

10 It's slightly different than this
11 version, but at least as amongst the two Calpine
12 projects we'd have a consistent approach, which
13 would help us from a compliance perspective.

14 So, again, this is an area where I think
15 there's a lot of concern among Applicants.
16 Sometimes the Applicant is required to prepare a
17 plan, and keep it on basically at the project
18 site. The basic procedural question that arises
19 -- and I don't anticipate this actually becoming a
20 problem, but -- assuming that there's a
21 disagreement between the staff and the Applicant
22 about a compliance plan for operations, in theory
23 the staff could basically say you cannot move
24 forward with the construction of the project, or
25 you can't operate the project.

1 And that would be based on a document
2 that is secret, essentially, and isn't available
3 to the public. I know the Commission is
4 struggling with this issue. I know it's been
5 dealt with in another case. I know you're still
6 struggling with how to proceed there, but there
7 are some basic questions about what the process
8 might be, should there be a disagreement between
9 the staff and the Applicant.

10 And I would say in that respect that
11 this Com 8 is different than, say, for example a
12 disagreement over approval of a biological plant.
13 In the biological setting the entire document
14 would be public, there are some pretty clear
15 standards that are not evolving quickly.

16 So the bottom line is we want to go back
17 and look. Our preference would be to have the
18 same condition as the Inland Empire.

19 HEARING OFFICER WILLIAMS: Staff?

20 MR. KRAMER: This was simply meant to be
21 helpful, to offer the latest version of this
22 condition. If it's not helpful we'll just
23 withdraw our suggestion and ask instead that the
24 condition remain as originally proposed by staff.

25 COMMISSIONER GEESMAN: Well, would there

1 be a problem with using the condition as it
2 appears in the Inland Empire decision?

3 MR. KRAMER: Well, when I get around to
4 making, I guess, an opening comment. Staff is
5 concerned about the constant cherry picking of
6 conditions that's been going on in this case.
7 Today we're to the point to where we're just
8 cherry picking verifications, not even full
9 conditions anymore.

10 But we'd have to talk to Dr. Greenberg
11 and see how he feels about that. And we could do
12 that and get back to you before the end of the
13 hearing.

14 COMMISSIONER GEESMAN: Okay, why don't
15 we do that, and let's do it with the presumption
16 that there needs to be a compelling reason not to
17 utilize the condition that the Commission recently
18 approved in the Inland Empire case.

19 Mr. Harris, did I understand you to
20 suggest that your client would like to have that
21 similar condition uniformly applied in all of its
22 existing licenses?

23 MR. HARRIS: No, I'm sorry, I think this
24 general issue of security is one that cuts across
25 all projects, ones in the licensing process now,

1 ones that are licensed. I think that really this
2 is a subject for a rulemaking that would be
3 applied then retroactively to the licensed
4 projects, and on an ongoing forward basis to new
5 applications.

6 There are some basic due process
7 questions, and for the most part Applicant and
8 staff are going to agree on security issues. And
9 what we're guarding against here is the unlikely
10 event that staff and Applicant disagree on some of
11 these plans.

12 And as it is now the Applicant would not
13 be able to construct or operate a facility based
14 on a disagreement that one, I'm not sure is based
15 in LORS, and two, is not something we can publicly
16 debate -- nor should we publicly debate it.

17 So I would suggest that the Commission,
18 maybe the Siting Committee at some point -- and
19 we'd be glad to come to talk to you about this --
20 talk about a general approach to these security
21 issues.

22 MR. KRAMER: I don't see the inability
23 to debate the appropriateness of each side's
24 position publicly though as preventing resolution
25 of the impasse by the Commission. So I don't

1 think it's any sort of fatal problem.

2 There are always going to be
3 disagreements, and the possibility that some of
4 them will rise to the level where the project
5 should wait until they're resolved. Whether or
6 not this is one of them we'll wait for the
7 Committee to decide.

8 MR. HARRIS: Again, I think the unique
9 aspect here is the confidential nature of the
10 information. We agree, again, it should be
11 confidential, we don't want security plans out
12 there publicly.

13 But if Dr. Greenberg suggests, you know,
14 that the plan requires this element, then our
15 first question is going to be what's the LORS that
16 you used to decide that element's necessary. And
17 then secondly what's the standard that we use to
18 determine whether we've met that requirement.

19 So again, that's why I think a
20 generalized proceeding is probably in order. In
21 lieu of that, I guess to deal with this project we
22 would prefer to deal with the Inland language.

23 HEARING OFFICER WILLIAMS: Okay.
24 Members of the public, would you like to make a
25 comment on this?

1 MR. BENELLI: I'm a little concerned
2 with what is secret and what is public here. Are
3 there security reasons for this?

4 HEARING OFFICER WILLIAMS: Staff, could
5 you --?

6 MR. KRAMER: Well, we're talking about
7 the security plan for protecting the facility, so
8 you wouldn't expect either the facility plans or
9 the plans for protecting it to be available on the
10 Internet, for instance, so the terrorists can, you
11 know, use their broadband connection to do their
12 research.

13 MR. BENELLI: Okay, I understand that.

14 HEARING OFFICER WILLIAMS: Mr. Sarvey,
15 do you have anything on this topic?

16 MR. SARVEY: No.

17 HEARING OFFICER WILLIAMS: Okay. Then
18 we'll close it out, except for the opportunity of
19 staff to provide comments from Dr. Greenberg.

20 We've already talked about transmissions
21 and system engineering, our next topic. However,
22 in its comments Applicant proposed that we delete
23 the word "oversized" in a couple places, a
24 terminology that we use.

25 And I think that term was used by staff

1 and it found its way into the PMPD. Staff, do you
2 have any objection to us deleting that?

3 MR. KRAMER: No.

4 HEARING OFFICER WILLIAMS: Okay. So
5 we'll do that. Next in order I think --

6 MR. KRAMER: Excuse me. We had our own
7 comment about transmission and system engineering.
8 It was more of a legal comment, but --

9 HEARING OFFICER WILLIAMS: Okay.

10 MR. KRAMER: We don't have much to add
11 to what was said, but I wanted to make sure that
12 the Committee had those in mind as well.

13 HEARING OFFICER WILLIAMS: Okay. We've
14 seen, we reviewed your comments, and we
15 understand. So that'll close out transmission
16 system engineering.

17 Next is air quality. The first thing
18 that I saw was that staff was proposing that we
19 insert a new sentence on page 124. And it has to
20 do with, the district has proposed that the basin
21 be reclassified as an extreme non-attainment area
22 for ozone. Applicant, do you have any objection
23 to that insertion?

24 MR. HARRIS: Well, I guess at the most
25 basic level, there's nothing in the record to

1 support this new information. That, I think, may
2 be a recurring theme here. There's nothing in the
3 record that supports the proposed change, and I
4 think it doesn't add anything to the decision, and
5 so we would be opposed to the additional language.

6 HEARING OFFICER WILLIAMS: I don't think
7 it adds anything to the decision. So I understand
8 Applicant's objection to that. Is there anything
9 in the record that would support this?

10 MR. KRAMER: The Commission could take
11 administrative notice, or judicial notice -- I
12 believe it was Thursday, the action of the San
13 Joaquin board to decide to request the status.
14 I'll let Will make the case for including this.

15 It's certainly not absolutely necessary
16 to any of the points, but it does bring our
17 understanding of where the district is a little
18 more up to date. And I think that's why we're
19 offering it. Will, do you have anything to add?

20 MR. WALTERS: Well, actually it just
21 corrects the record in terms of what the current
22 status is, so the record doesn't reflect something
23 that isn't essentially the case anymore, at least
24 in terms of where the district is going. We know
25 now that the board has in fact agreed to try to

1 seek extreme non-attainment.

2 MR. KRAMER: But it's not going to
3 change the condition or anything?

4 MR. WALTERS: No.

5 HEARING OFFICER WILLIAMS: It's not, so
6 my inclination would be to not put it in, over
7 Applicant's objection. Because it's not going to
8 change anything, and it's really not relevant to
9 the decision at this point.

10 Moving on, Applicant is proposing that
11 we replace the language in air quality C1 through
12 C4 with language applied in the Turlock matter.
13 And I take it staff, in your cherry picking
14 remarks, this is probably what you were talking
15 about?

16 MR. KRAMER: Yes. And this request
17 forced us to go look at it -- the staff is
18 somewhat short on time because they're still
19 working on new cases. But they did make an effort
20 to review the request, and by and large we can
21 accept at least a big portion of the proposed
22 changes. C1 would be fine.

23 Will, you'll correct me if I get any of
24 this wrong. C2 is fine. In C3, though, we can
25 accept the proposed changes to the point of

1 including AQC3 subsection P, but we need to keep
2 the language that follows P. And the decision, as
3 it's currently formatted, there's a bullet under
4 P, and that basically describes what the project
5 owner needs to do if dust is observed.

6 In other words, if there's a need to do
7 more is discovered. As I understand it, the
8 Applicant was proposing to eliminate all that, and
9 we don't think that would be appropriate. So we
10 mostly agree, but not entirely.

11 HEARING OFFICER WILLIAMS: And we're
12 talking about C4?

13 MR. KRAMER: C4 would be fine. We, of
14 course, would not agree to delete C5.

15 HEARING OFFICER WILLIAMS: No, we
16 haven't gotten to C5 yet. So, would the parties
17 like to try to work out C1 through C4 language and
18 send it to me?

19 MR. HARRIS: I think we're in agreement
20 with Mr. Kramer's assessment. The issue of
21 contention is going to be Sub P of AQC3. And that
22 we believe would be an issue for the Committee to
23 decide. It's really a sub-part of the AQC5
24 monitoring conditions.

25 So I think what I can say right now, as

1 to the rest of those four conditions, we're in
2 agreement. And this one subsection will be
3 something we'll ask the Committee to handle.

4 MR. KRAMER: Can we be clear about it
5 here. The bullet that follows P we see as an odd
6 numbered series of paragraphs that's meant to
7 apply to everything above it. So it's not really
8 a part of P in our -- I think there's a formatting
9 issue here. And this condition has appeared in
10 other cases, and it's not lettered.

11 So it's not a part of P, it's just a
12 general series of paragraphs that follows the
13 specific list of measures, and applies to all of
14 them. That's the way we want to see that, and
15 that's the way we proposed it.

16 MR. HARRIS: We were -- if I might, this
17 is Gary Rubenstein. So what you're saying is, I'm
18 sorry, is paragraph P stays with AQC3, which is
19 simply language that ties AQC3 to the district's
20 rules.

21 And my understanding is that you've
22 agreed, the staff has agreed that language can be
23 the same as what's in the TID language, and we're
24 only talking about the bullet point, not paragraph
25 P -- am I understanding you, Paul?

1 MR. KRAMER: That's correct. No, wait a
2 minute -- no, actually I guess, I think I misspoke
3 earlier. You want to keep the old P, right?

4 MR. WALTERS: No, no, the new one's
5 fine. It just wasn't numbered P in the new
6 version -- excuse me, lettered. I'd prefer to
7 have it lettered for clarity.

8 MR. KRAMER: Okay. So P, but then it's
9 the bullet under P in 148 of the decision, that's
10 -- I mean, it's fine if it's bulleted, I guess,
11 but we want it understood that that's not a part
12 of P.

13 MR. RUBENSTEIN: Okay, now I understand
14 what you're saying. I agree. Mr. Williams, for
15 the benefit of the Committee, I think we can work
16 with the staff to get you a clean version of the
17 language, so you don't have to try to interpret it
18 from the transcript of this afternoon.

19 The disputed area remains the bulleted
20 language under paragraph P, which we believe is
21 associated with AQC5. And however the Committee
22 decides on AQC5, whether that bulleted language
23 will remain in or will it not.

24 MR. KRAMER: Well, actually that's not
25 the way we've worked this in other cases though.

1 Even if AQC5 weren't here, this language would
2 talk about observation of visible dust plumes and
3 require additional work if they're found. It just
4 wouldn't have the reference to the five microgram
5 differential. But all of that language would not
6 disappear.

7 MR. RUBENSTEIN: I guess --

8 MR. KRAMER: And I could cite Salton
9 Sea, for instance. There's language similar to
10 this that remains in there. There never was an
11 upwind/downwind monitor requirement on Salton Sea.

12 MR. RUBENSTEIN: You had mentioned that,
13 you said in other cases. I don't believe I've
14 seen this language in any other case I've worked
15 on. So it may be that I've missed all of them
16 where this appeared. So that's why it's a little
17 new to me, which is why I assumed that it was
18 associated with the monitoring requirement of
19 AQC5.

20 MR. KRAMER: Not entirely, a line of it
21 is, or so. But not all of it.

22 MR. RUBENSTEIN: I believe, Mr.
23 Williams, if AQC5 were to be deleted, I think that
24 we could commit to work with the staff on some
25 bulleted language to reach some agreement that

1 might not look exactly like this. If not, then I
2 think our concerns about the bulleted language, if
3 AQC5 remains in, our concerns about the bulleted
4 language are magnified.

5 HEARING OFFICER WILLIAMS: Okay. Well,
6 you all try to work it out and send me something,
7 and the Committee will ultimately make the call on
8 it. But to the extent that you can agree on
9 something, send it to me.

10 MR. KRAMER: When would we have to do
11 that by? I'm sure you're looking at some resource
12 constraints on the staff side. I mean, we are
13 just about to enter the week where traditionally
14 people are hard to find.

15 MR. HARRIS: If Mr. Walters is available
16 as soon as we're done here by telephone, we could
17 get together by phone, perhaps with Mr. Golden,
18 and we'll try to work it out this afternoon?

19 MR. KRAMER: Okay, well, we can try.

20 HEARING OFFICER WILLIAMS: Okay, okay.
21 We do have some time, since we're not going to the
22 Business Meeting until the 14th.

23 Next then will be AQC5 upwind/downwind
24 monitors. I know Applicant strenuously objects to
25 their imposition, so Applicant, do you want to

1 make your case against upwind/downwind monitors?

2 COMMISSIONER GEESMAN: Now, we've read
3 your written file. And if there's anything you'd
4 care to share with us that wasn't included in the
5 written filing, please do so now. But don't
6 simply reiterate what you've filed with us in
7 writing.

8 MR. RUBENSTEIN: The main objection that
9 we have to the proposed decision in this regard is
10 that we believe that this project is not in fact
11 unique. We have, for the convenience of the
12 Committee, prepared a table which summarizes the
13 characteristics of other proceedings in which this
14 issue has arisen.

15 All of the information contained in this
16 table comes from either Commission decisions or
17 docketed filings, projects that have been before
18 the Commission. And what we've done in this table
19 is to set out the criteria that the Committee had
20 laid out in the PMPD as reflecting the staff's
21 position that this project is unique and compare
22 these criteria among these various different
23 projects.

24 And without dwelling on it in a lot of
25 detail, what you can see from this is that this is

1 one of only two projects -- actually one of only
2 three projects that the staff has proposed PM10
3 monitoring on, at least that we're aware of.

4 And that they have not proposed
5 monitoring during construction for other projects
6 that are located in federal PM-10 non-attainment
7 areas, for projects that are located in counties
8 having higher asthma rates, for projects that have
9 larger areas of disturbed acreage, for projects
10 that have residences or schools closer than is the
11 case for this project, for projects that have
12 higher ambient PM-10 concentrations, and for
13 projects that have comparable or higher diesel
14 risks due to construction equipment.

15 Consequently, without belaboring the
16 points that we made in our written submission, we
17 believe that this issue is not unique to this
18 project, the circumstances of the project are not
19 unique, and that the monitoring requirement should
20 not be required.

21 We would also urge the Committee to
22 particularly review the discussion of this issue
23 in the recent Inland decision, which we believe is
24 directly on point. One of the similar facts
25 situations between Inland and this project is that

1 both projects are located in areas where there are
2 disturbed soil from other activities surrounding
3 the project site.

4 In the case of the San Joaquin Valley
5 obviously it's mostly agricultural-related. In
6 the case of Inland it's a mixture of agriculture
7 and industry, industrial sources.

8 HEARING OFFICER WILLIAMS: Staff, do you
9 want to say anything on this?

10 MR. KRAMER: Now we've got a bunch of
11 new -- we basically have no time to verify this
12 information on this table, or to consider it.
13 We'd object to it on that basis. Of course it's
14 not a part of the record.

15 In attempting to invoke the Inland
16 decision the Applicant is attempting to "bring
17 over" if you will the decision and the result, but
18 everything that led to that decision, all of the
19 evidence, is not a part of the record in this case
20 nor available to the Committee, nor is the
21 decision -- the staff was not in agreement with
22 that decision.

23 Just today we've circulated to the
24 Commissioners and to the proof of service list on
25 the Inland case a statement that we'd hoped to

1 read at the Commission adoption hearing, but were
2 unable to because of the speed of the motion to
3 adopt and to vote immediately after the Hearing
4 Officer's presentation at the Business Meeting.

5 MR. HARRIS: Excuse me, is that a Motion
6 for Reconsideration that you're filing?

7 MR. KRAMER: Thus far we have
8 specifically not treated it as such.

9 MR. HARRIS: But you might treat it as
10 such?

11 MR. KRAMER: I will forward your
12 speculation back to our management.

13 MR. HARRIS: Wow.

14 MR. KRAMER: Of course, in this case
15 there was concern about high asthma rates. This
16 is suggesting that in the Inland case the asthma
17 rates were similar, but that was not an issue that
18 was raised by staff or any party in Inland. And I
19 don't know this to be the case. That's maybe
20 something that Dr. Greenberg could help us with,
21 but I don't know that he's prepared with his data
22 today either, he's not yet on the phone.

23 One thing we did discover, after the
24 hearings in this case, was that the emissions
25 estimates by the Applicant -- and it's basically

1 the same construction emissions estimates -- are
2 basically the same package that they've submitted
3 on several cases of various sizes, from the TID
4 case, which is a relatively small power plant, up
5 to this case, which is among the largest of the
6 plants.

7 But there was a rather significant math
8 error, an error in the model, that means it is no
9 longer appropriate to call the emissions that were
10 estimated conservatively overstated. The estimate
11 increased by a factor of approximately two for
12 this project.

13 So to the extent that's a part of the
14 rationale for not adopting the monitoring
15 requirement we don't think that would be
16 appropriate anymore. And if the Committee is
17 looking to find the updated analysis of the
18 modeling construction, that could be found in the
19 TID case. That's where it first surfaced. Staff
20 discovered it several months after the hearing in
21 this case.

22 So we are very concerned that another
23 decision decided by another committee, on facts
24 that may or may not be similar but there's really
25 no way to know without a detailed examination, be

1 used to influence the decision in this case.

2 MR. HARRIS: Mr. Williams, if I could.

3 As to the information in the table, Mr. Kramer
4 properly noted the Commission could take official
5 notice of its own decisions. We've compiled it
6 here for your convenience. We're not asking that
7 this be made an exhibit, it's simply a reference
8 document.

9 I would note, too, that the 24 hour
10 average construction maximum number of 64.9, that
11 is the staff's number. So the issues about the
12 methodology, we disagree with staff's
13 characterization there. But be that as it may,
14 the number that's in this table is the staff's
15 number. And you'll note how that compares to
16 other projects.

17 We are not asking you to introduce the
18 Inland Empire record into this proceeding. We are
19 asking you to have a certain consistency among the
20 Commission's decisions.

21 MR. RUBENSTEIN: One final point, if I
22 might. With respect to the comments about the
23 error identified in the TID case, there were a
24 number of disagreements regarding the modeling
25 analysis in the TID case. All of those issues

1 were ultimately resolved between the staff and the
2 Applicant.

3 I was the Applicant's consultant in that
4 case as well. We had agreed as part of that
5 discussion that we were not going to go back and
6 revisit several other cases which used an older
7 methodology. San Joaquin Valley Energy Center was
8 one of them.

9 Even after correcting the one error that
10 Mr. Kramer referred to there were other
11 modifications to the methodology that reduced the
12 impacts, and we simply agreed with the staff at
13 that point that there would be no purpose in going
14 back and revisiting the analysis for this case.

15 So I guess I'm a little chagrined that
16 error is being brought up here as a reason for
17 supporting the request for modeling. As Mr.
18 Harris has just pointed out, the number that we're
19 referring to in this table is from the Committee
20 decision. The Commission, the proposed decision
21 which leaves the staff's number, rather than the
22 number that includes the error.

23 COMMISSIONER GEESMAN: Based on the
24 record in this proceeding, AQC5 will stay.

25 HEARING OFFICER WILLIAMS: Okay, we're

1 going to move on to AQC9, which is -- I take it
2 from staff's comments that Applicant's request to
3 change the language is fine?

4 MR. KRAMER: I think we propose to do it
5 a little differently. Our goal is to get the
6 information as soon as it's available. We don't
7 need them to submit the same information to us
8 four times a year when it only changes once a
9 year. But what we would prefer to see -- and we
10 don't have anything written, if the Committee
11 wants our help we could propose something a little
12 later.

13 But just require the Applicant to
14 provide the report to us within 30 days of it's
15 issuance by the air district. Because as they
16 proposed it, if the report was issued at the
17 beginning of a quarter they may not have to
18 provide it to us for up to three months.

19 HEARING OFFICER WILLIAMS: Can you all
20 see if you can work something out, again, and see
21 if you can get it to me. Is that something you'd
22 be willing to try to work on?

23 MR. RUBENSTEIN: Yes, we don't have any
24 objection to the Applicant's proposal on that
25 portion of that condition. There was a second

1 issue on that condition.

2 HEARING OFFICER WILLIAMS: What was the
3 first one?

4 MR. RUBENSTEIN: Well, you just
5 mentioned the first one, which was the frequency
6 of submitting reports. The second is that the
7 second part of the verification requires that a
8 revised ERC plan be submitted within seven days of
9 receipt of notice with EPA that the ERC package
10 was invalid.

11 We proposed to notify the CPM in seven
12 days, but then submit a revised package within
13 60 --

14 HEARING OFFICER WILLIAMS: Right. I
15 don't think staff has a problem with that. Staff,
16 do you have a problem with that?

17 MR. KRAMER: No.

18 HEARING OFFICER WILLIAMS: I think
19 you're fine on that.

20 MR. WALTERS: I think we've agreed that
21 that's amenable.

22 MR. RUBENSTEIN: Okay.

23 HEARING OFFICER WILLIAMS: Yes, it's
24 just that nuance with regard to, you know, the
25 reporting.

1 MR. KRAMER: So -- let me make sure I
2 have it right, because there were two
3 conversations. So they have to tell us that
4 there's a problem within seven days, but they have
5 60 days to produce?

6 HEARING OFFICER WILLIAMS: Right.

7 MR. KRAMER: Okay.

8 HEARING OFFICER WILLIAMS: So I think
9 you all should be able to work that out.

10 MR. KRAMER: I think so.

11 HEARING OFFICER WILLIAMS: And just get
12 that to me as soon as you can. Now, air quality
13 C10 through 12. Staff is recommending tracking
14 conditions, which adopts the district's style
15 format. Applicant, do you have any objection to
16 that?

17 MR. HARRIS: Yes. I'd like Mr.
18 Rubenstein to speak first to the substantive
19 issues, and then there's one legal question we
20 want to raise.

21 HEARING OFFICER WILLIAMS: Because it
22 appears as if staff has been doing this in recent
23 cases, of putting the tracking condition in the
24 final staff analysis document.

25 MR. RUBENSTEIN: I think the concerns

1 that we have are more procedural and legal than
2 substantive. I've reviewed the conditions and
3 they accurately reflect the offsetting credits
4 that are being provided for this project.

5 MR. HARRIS: If I can, the issues that I
6 have are twofold. First off, I think the
7 Committee found properly that this is unnecessary.
8 And I think that's a basis for you to not add
9 conditions, instead of at a generic level. It
10 isn't necessary.

11 If there's going to be a change there's
12 a process we'll go through. It'll be a public
13 process. The suggesting that there needs to be a
14 public comment period or something else I think is
15 simply redundant. It's regulation for
16 regulation's sake, so I think it's unnecessary.

17 In the strictest sense I think it may be
18 unlawful. The requirements in the recent
19 amendments to Warren-Alquist and SB 28X basically
20 requires that the offsets have to be identified.
21 There has to be a certification by the air
22 district that they will be identified, that they
23 have been identified and will be obtained by the
24 Applicant within the time required by the
25 district's rules.

1 Well, the district stated a preference
2 for having these listed. The district's rules
3 don't require that. So you're at a circumstance
4 here where I think this condition actually runs
5 afoul of that change in SB 28X to Public Resources
6 Code 25523D, as in David, 2.

7 So if you don't need it, and there's a
8 good argument that it's unlawful, I think those
9 are two good reasons to leave it out. A third
10 reason is that, if you look at the end of the
11 verification of each one of these conditions, the
12 staff is requesting review, public noticing, and
13 approval of these conditions.

14 Review and comment is one thing. Review
15 and approval by the staff in each one of these
16 verifications I think is simply incorrect.
17 There's a decision that's being made by the air
18 district, and the staff does not have an approval
19 authority over that action.

20 So I really strongly disagree with the
21 suggestion that staff can approve or disapprove
22 those offsets independent of the air district
23 determination.

24 MR. RUBENSTEIN: I think, just to
25 elaborate on that point, the concern here is that

1 the staff will be making an independent LORS
2 determination. Not with respect to the staff's
3 obligations under CEQA, but the concern is that --
4 as they have tried to do in this case -- make an
5 independent LORS determination.

6 So that even if the air district
7 concludes that the revised credit package is
8 acceptable, to satisfy the district's rules, the
9 CEC staff may conclude that the revised package
10 does not meet the district's rules. And it's that
11 issue that we're particularly concerned about.

12 MR. HARRIS: And that concern arises
13 from the language that precedes these conditions.
14 The staff says "an offset that may satisfy air
15 district requirements may not provide adequate
16 CEQA mitigation to distance between the offset
17 source and the project." Another factor is that
18 it suggests other factors that staff reviews as
19 part of its analysis.

20 So the concern there is that -- as Mr.
21 Rubenstein I think well articulated -- that there
22 is some kind of approval that is inconsistent with
23 the existing process. So it's not necessary,
24 everybody agrees it's not necessary. It's
25 potentially unlawful. And third, it gets into

1 areas of staff approval that we really don't need
2 to go to.

3 And so I think, discretion being the
4 better part of valor, that the Committee ought to
5 know that they will be informed if a change is
6 made, but not require these conditions.

7 MR. KRAMER: Well, while I didn't
8 participate in the TID case, I'm informed that no
9 similar objections were made to basically the same
10 conditions in that case. Staff does have a role
11 in -- under CEQA -- to determine whether the
12 impacts of the project have been adequately
13 mitigated. And that's independent of the air
14 district's rules.

15 We don't presume that satisfying the air
16 district's rules automatically means that all of
17 the environmental impacts have been mitigated.
18 And that's especially important in a district as
19 large as this, where you may have -- this project
20 is roughly in the middle of the district, maybe a
21 little bit to the south of the middle, nad there's
22 quite a distance between this project and the
23 borders of the district.

24 And an offset that's as far afield from
25 the project, while it may satisfy the district who

1 balances things out on a district-wide level, it
2 may not provide the mitigation that the staff
3 requires.

4 I don't think that we're trying to give
5 ourselves a veto over the decisions that the
6 district makes, but we do need to exercise that
7 independent role, and therefore also need to
8 approve any changes to the package.

9 HEARING OFFICER WILLIAMS: What about
10 Applicant's argument that this might be unlawful?

11 MR. KRAMER: Well, if you read further
12 in 25523D2, it specifically requires the
13 Commission to impose a condition so that the
14 identified offsets will be surrendered, as
15 required under district rules.

16 So I might argue to the contrary, that
17 this is necessary to satisfy that obligation. And
18 I thank Mr. Harris for pointing out an argument
19 that I neglected to put on paper.

20 MR. HARRIS: Well, let me respond and
21 note the word "or" as significant in that phrase.
22 That's a second path that can be taken. The
23 language is "or" unless the applicable air
24 district requires emission offsets to be obtained
25 prior to the commission of operation.

1 And the condition shall require, as a
2 condition, that the Applicant obtain those
3 required offsets within the time required by the
4 applicable district rules. So if you read the
5 entire sentence it supports our position.

6 HEARING OFFICER WILLIAMS: Okay. Well,
7 I think the Committee will make the call on this
8 one, having heard the comments. Next is, staff is
9 recommending a condition that supports the
10 Committee's determination that the Applicant must
11 provide offsets for SO2 emissions. Applicant, do
12 you have an objection to this proposed condition?

13 MR. RUBENSTEIN: Yes we do. If you
14 refer to exhibit 4A, which is Applicant's Group
15 Two testimony, which is I believe page 32.
16 There's a table which summarizes the offsets that
17 are being provided to satisfy the district's
18 requirements, and compares them to project
19 emissions.

20 That table shows that, while there is a
21 net increase of SOX emissions of approximately 22
22 tons per year, there is a net decrease in PM-10
23 emissions of 63 tons per year and a net decrease
24 in NOX emissions of 119 tons per year, and a net
25 decrease in VOC emissions of 91 tons per year.

1 In every other case that I've
2 participated in before this Commission the staff
3 has accepted, at varying ratios, the use of NOX,
4 SOX, and PM-10 emission reduction credits to
5 mitigate the PM-10 impacts of the project.

6 And frankly, I'm at a loss, given the
7 overwhelming reductions that we show in those
8 tables -- and those are based on numbers that come
9 out of the staff assessment -- why the staff
10 concludes that we haven't mitigated our SO2
11 impacts.

12 Rather than agreeing with the staff that
13 this condition would require us to mitigate our
14 SO2 impacts, I believe it requires us to mitigate
15 our SO2 impacts. I believe it requires us to
16 mitigate our SO2 impacts again, because they have
17 already been mitigated by the offsets that we are
18 required to surrender for the district.

19 HEARING OFFICER WILLIAMS: Staff?

20 MR. KRAMER: Well, I don't know that I
21 heard an answer to your question. I think what I
22 heard was that an objection to the premise of your
23 question, which was if the Committee agrees with
24 staff that SO2 mitigation should be provided, is
25 it appropriate to write that in the condition?

1 And I think the question answers itself in that
2 case.

3 MR. HARRIS: The question is an answer,
4 in that case. Mr. Rubenstein, I think, is
5 pointing out that the mitigation has been provided
6 in this case, at basically a one-to-one ratio.
7 And the request for the SO2 mitigation is a
8 request for us to mitigate again at greater than
9 the one-to-one ratio.

10 MR. KRAMER: Mr. Walters, did you want
11 to respond at all to that?

12 MR. WALTERS: Well, I think there's a
13 couple of issue that probably were left off that
14 table. Obviously, since I'm on the phone, I can't
15 view what you folks are looking at.

16 But obviously, one of the pollutants,
17 PM-10 precursors, that the project will have is
18 ammonia. And if you were to put the ammonia
19 emissions on that table you would be able to knock
20 all those negative balances out and show a net
21 positive balance in terms of precursor emissions.
22 So that's one thing.

23 Another thing. On this particular
24 project, unlike most of the other projects, or all
25 of the projects that have come in with 7E's or

1 7F's or other turbines where we think it's
2 appropriate, we're not requiring a lower ammonia
3 emission, or recommending at least a lower ammonia
4 emission. And that was one of the factors in
5 making the determination that the SO2 was required
6 in this case.

7 MR. KRAMER: So you're referring to the
8 slip rate?

9 MR. WALTERS: Yes, I'm referring to the
10 slip rates that we've agreed, for this project, is
11 okay, at 10 PPM. And that's another factor in the
12 overall emission estimate for PM-10 precursors.

13 MR. KRAMER: So you're saying that the
14 tables cited by Mr. Rubenstein doesn't tell the
15 entire story, in fact.

16 MR. WALTERS: I don't believe it does,
17 unless it has ammonia in there.

18 HEARING OFFICER WILLIAMS: Okay. Well,
19 again, I think the Committee will make the call,
20 based upon the comments that we've heard here
21 today. On air quality -- you have something?

22 MR. HARRIS: Yes, I'd like to be allowed
23 a little more opportunity for Mr. Rubenstein to
24 comment. This was not part of our PMPD comments,
25 because there was not an SO2 condition in the

1 PMPD. So our filing did not address this issue.

2 So if you would indulge Mr. Rubenstein,
3 please?

4 HEARING OFFICER WILLIAMS: Oh, sure.

5 MR. RUBENSTEIN: I believe that the
6 comment about the table not including ammonia is a
7 bit fallacious in that the NOX and SOX emissions
8 that we're talking about react with ammonia to
9 form particulate sulfate. We're mitigating the
10 impacts. You don't have to mitigate each of the
11 ions separately.

12 If you mitigate the SO2 emissions
13 impacts, using an appropriate inter-pollutant
14 ratio, then you are mitigating the full PM-10
15 impacts, including all of the ammonia that
16 combines with that SO2.

17 For the staff to suggest that the
18 argument doesn't hold water because the table
19 doesn't include ammonia emissions again is
20 inconsistent with just about every other version
21 of this analysis I've seen, most recently the SMUD
22 Cosumnes Power Project, exactly the same issue was
23 addressed and resolved without the requirement for
24 additional credits.

25 HEARING OFFICER WILLIAMS: Do you agree

1 with staff's position that if you change the fuel
2 content rate in Pastoria that what we're talking
3 about here is really almost, you're going to end
4 up with excess credits as opposed to having to
5 provide any credits?

6 MR. RUBENSTEIN: In theory that would be
7 true. The problem, Mr. Williams, is that air
8 districts interpret those fuel sulphur contents
9 minutes in different ways. And Calpine has some
10 painful experience with some air district's
11 interpreting the fuel sulphur content as applying
12 to any instantaneous sample that's collected on
13 any individual day.

14 That is making this Applicant extremely
15 uncomfortable with the idea of reducing allowable
16 fuel sulphur contents to satisfy an Energy
17 Commission requirement that we believe is
18 redundant, at a risk of creating a new problem
19 with the local air district.

20 MR. KRAMER: May I respond to that? Mr.
21 Walters, did the Applicant use the same higher
22 fuel content assumption in the San Joaquin case as
23 they did in Pastoria?

24 MR. WALTERS: No, it's about one third.
25 And the district had no problem with it, they just

1 made sure it was part of their condition.

2 MR. KRAMER: Okay. So I can't
3 understand Mr. Rubenstein's concern then, if he
4 didn't pay service to it in this particular case.

5 MR. RUBENSTEIN: I can explain my
6 concern, if you like, which is that the issue has
7 arisen long after we've submitted this analysis.
8 And we're going to have to deal with the San
9 Joaquin District in terms of how they address the
10 enforcement of that condition before this project
11 starts operation.

12 MR. HARRIS: And, if I could, one other
13 legal argument I'd like to make. During the
14 evidentiary hearings we talked to Mr. Walters
15 about trigger levels, and with SO2, the district
16 threshold I think is 20 times I want to say.

17 And the issue became, basically, whether
18 staff's view of CEQA is that the impact has to be
19 absolutely zero. And staff's position is exactly
20 that. There can be no impact. They have ignored
21 the threshold of significance that's been
22 established by this air district, and said
23 essentially that you have to, the impact has to be
24 zero.

25 If there are 10,000 pounds per quarter

1 then that's the mitigation level required. Staff
2 always points to some ubiquitous CEQA authority to
3 do this, but this is an incorrect reading of CEQA.
4 CEQA requires a mitigation for a significant
5 impact. That 20 tons per year, set by the
6 district, is a significance threshold that the
7 Commission ought to respect. And certainly in no
8 case should the answer be that the significance
9 threshold is zero. And that's the staff's
10 position.

11 MR. RUBENSTEIN: Even if the threshold
12 is zero, the offsets that we're providing to
13 satisfy the district meet that test. That's
14 where, fundamentally, I keep having this problem,
15 is that we are mitigating all impacts to zero.

16 HEARING OFFICER WILLIAMS: Well, I think
17 we've already ruled against you on that one. So
18 basically, what we're trying to do is determine
19 whether or not we need to have a condition that
20 addresses this matter in here.

21 Now, I sympathize with you in terms of
22 your comments about the merits, but if you could
23 more pointedly tell me your feelings about what a
24 condition will or will not accomplish, or why it
25 should or should not be in here, I think that

1 might be more helpful.

2 MR. RUBENSTEIN: I think then, if we
3 were to focus specifically on the condition, that
4 I would suggest that it be worded "that the
5 project owner shall surrender SO2 or PM-10 ERC
6 certificates from the San Joaquin Valley Air
7 Pollution Control District ERC bank, in an amount
8 sufficient to mitigate all of the project's SO2
9 emissions."

10 HEARING OFFICER WILLIAMS: And I would
11 like to give the parties an opportunity, since
12 this is totally new, to attempt to work out
13 regardless of how the Committee decides, but at
14 least to have something agreeable in form, if
15 that's possible.

16 Now that does not mean that the
17 Committee is going to put it in the decision, but
18 to the extent that we have something that is
19 agreeable in form then I think we're closer to
20 trying to get a resolution one way or another. So
21 could you all likewise attempt to work on that?

22 And give us something in writing, with
23 the understanding that it's purely as to form
24 independent of whether or not the Committee
25 decides that it should be a condition.

1 MR. RUBENSTEIN: We will do our best,
2 Mr. Williams. We attempted to do that before
3 today's meeting, and the staff indicated they were
4 unavailable to meet with us, so we will try again.

5 MR. KRAMER: Well, this condition wasn't
6 even the subject of that request -- nor could it
7 have been I suppose, because we hadn't proposed
8 it. I need to make one comment in response to
9 what Mr. Harris said.

10 I think it is wrong under CEQA to assume
11 that an air district's threshold for regulatory
12 application is a threshold of significant, either
13 for the district or if need be one for the
14 Commission.

15 Here, what staff was doing was looking
16 at an area where PM-10 is already over the limits,
17 and finding SO2 emitted that would convert and
18 further push it over the limits, and deciding that
19 the SO2 needed to be offset for that reason under
20 CEQA.

21 HEARING OFFICER WILLIAMS: Right. I
22 think the Committee's already made its
23 determination that it's appropriate to mitigate
24 the SO2 impacts, and -- if I can speak fo the
25 Committee -- I don't think the Committee is going

1 to revisit that.

2 The only issue before the Committee is
3 whether or not it puts a condition in the decision
4 that staff is proposing. To the extent that we
5 have some agreement on the form, then it will be
6 easier for the Committee to give it a thumbs up or
7 a thumbs down.

8 MR. HARRIS: I just want to make the
9 comment, this is very different than proposed
10 conditions 10, 11 and 12. In 10, 11 and 12 we
11 were basically memorializing a process that would
12 occur anyway. In this condition --

13 HEARING OFFICER WILLIAMS: So does that
14 mean you agree to 10, 11 and 12?

15 MR. HARRIS: No, I don't think you ought
16 to regulate just because you can. There's no
17 value added for 10, 11 and 12. But I want to
18 point out the distinction here. On 13 you're
19 actually requiring additional surrender of offsets
20 for an impact that doesn't exist, and even if we
21 accept staff's analysis about that impact
22 existing, CEQA doesn't require the mitigation.

23 We would like the opportunity to
24 summarize those arguments for you before you rule
25 on that issue. We will get that to you before the

1 5th I think is when you ask for comments from the
2 general public. Because this is fundamentally a
3 different issue than 10, 11 and 12. This is an
4 actual impact on the project, as opposed to
5 process.

6 MR. KRAMER: I think we would like a day
7 or two to respond to the letter that they're going
8 to file, so perhaps they can get it in a little
9 bit sooner, unless the Committee wants to give us
10 a little bit beyond the 5th.

11 MR. HARRIS: We're not asking for
12 anything. We're taking advantage of the common
13 period which runs to the 5th.

14 COMMISSIONER GEESMAN: I think that one
15 thing that both parties ought to give some
16 deference to, as Mr. Williams indicated, is that
17 what we're seeking here is a condition related to
18 SO2. We do not intend to revisit the question as
19 to whether offsetting SO2 impacts is necessary or
20 not.

21 So in utilizing your time between now
22 and the 5th, you might want to give that the
23 proper weight.

24 HEARING OFFICER WILLIAMS: Yes, I mean,
25 we really don't want to delve into this matter

1 again. The Committee has already decided it's
2 appropriate. So what we're looking for is a
3 mechanism to enforce it, or whether we need a
4 mechanism. That's what we're interested in.

5 MR. RUBENSTEIN: Mr. Williams, can I ask
6 for one clarification. Is it the Committee's
7 determination that SO2 emission must be mitigated,
8 or is it the Committee's determination that
9 additional emission reduction credits must be
10 surrendered? Those are two different questions.

11 HEARING OFFICER WILLIAMS: Yes, I agree.
12 And I think that the analysis in the PMPD was
13 that, if you change the sulphur content in
14 Pastoria then you're going to have more than
15 enough -- based upon that offset -- to satisfy
16 what staff is requesting. I mean, it's basically
17 an even exchange.

18 So it's not something that we see as
19 causing you some degree of onerousness. I mean,
20 it seems to us that you can easily meet this
21 requirement, and we're not seeking to impose on
22 you something that's out of the ordinary, based
23 upon our read of what's available to you.

24 MR. RUBENSTEIN: I understand. And I
25 expressed a little earlier the concerns that I've

1 got about making that change to Pastoria, and I
2 don't want to burden the Committee with that issue
3 at this time.

4 But I'm still trying to understand
5 whether the fundamental determination by the
6 Committee here is that SO2 emissions impacts
7 should be mitigated, or have you also concluded
8 that something extra beyond what the Applicant has
9 already provided must be provided to mitigate
10 those impacts?

11 HEARING OFFICER WILLIAMS: No, I don't
12 think the Committee determined that something
13 extra, based upon the record in this case, needed
14 to be provided. I think we accepted staff's
15 analysis that the SO2 problem should be addressed,
16 and that there was a very easy way to address it.

17 And we required you to address it in
18 other cases. It's not something that is unique.

19 MR. RUBENSTEIN: Then I might suggest,
20 we might suggest an alternative approach for
21 addressing that same problem, understanding what
22 the Committee's decision is.

23 HEARING OFFICER WILLIAMS: Okay, so
24 maybe you can --

25 MR. KRAMER: I think I might be a little

1 confused now, because part of the staff's position
2 that the Committee said it agreed with was that
3 what the Applicant had attempted to offer so far
4 by way of mitigation, that is for instance the
5 calculation, the table that Mr. Rubenstein
6 referred to originally, was not enough. And that
7 therefore some extra SO2 reductions would have to
8 be brought to the table. So --

9 HEARING OFFICER WILLIAMS: It
10 essentially says that in the PMPD, on page 140 and
11 141, where it says "we adopt this approach as
12 reasonable." And it's laid out in the bullets at
13 the bottom of page 140.

14 MR. KRAMER: Yes. So I could see Mr.
15 Rubenstein, based on the dialogue he just had,
16 trying to come back and argue the table again, and
17 we would be at the same impasse. And I don't want
18 to stick you with that, because Commissioner
19 Geesman, I don't think, would be happy with that
20 answer.

21 HEARING OFFICER WILLIAMS: Yes, I don't
22 know how much clearer we could make it. We don't
23 want to revisit the question of whether Applicant
24 is provided or no. We've said that they've got to
25 provide additional SO2 offsets, and furthermore

1 there's a way for them to do it that makes it
2 really easy.

3 So I don't know what more we can do to
4 say that what we want is a condition that the
5 parties can agree on that would enforce that, or
6 whether indeed we need a condition to enforce it.
7 I think the language is pretty clear, and we don't
8 want to revisit Applicant's table or anything like
9 that, because we've made a decision that
10 additional SO2 offsets are needed.

11 MR. KRAMER: Well, I think we'll end up
12 agreeing to disagree about whether or not a
13 condition is needed, but hopefully we can come up
14 with language of a condition to be used if the
15 Committee decides it's needed.

16 HEARING OFFICER WILLIAMS: Yes, and
17 again, don't spin your wheels on trying to
18 convince us that we made the wrong decision,
19 because I don't think the Committee is going to
20 change its position.

21 Unless the parties have anything
22 additional, I think this concludes air quality, at
23 least the questions that I have. So I was going
24 to ask if you'd like to make a comment at this
25 point? Yes, sir, please -- you might have to come

1 forward.

2 COMMISSIONER GEESMAN: It's important to
3 speak into the microphone so that your voice gets
4 picked up on our transcript.

5 MR. BENELLI: Before I start my
6 statement, I do have one question with this
7 summary of PM-10 construction monitoring equipment
8 during the construction. I noticed that --

9 HEARING OFFICER WILLIAMS: Sir, just let
10 me say that you're James Benelli, and you're a
11 member of the public, and you're speaking on your
12 concerns in public health.

13 MR. BENELLI: That's right. As a
14 concerned citizen. I have a comment that will
15 take about three minutes. I'd like to read it
16 into the record.

17 First of all, I notice that his comment
18 on the San Joaquin Valley attainment, he shows an
19 asthma rate of 139 per 100,000; whereas, in the
20 San Francisco Bay Area he shows an asthma rate of
21 172 per 100,000. That certainly doesn't look
22 correct, as to my records.

23 In other words, from that I can assume
24 it's more dangerous to live in clean air than it
25 is in dirty air. Because their chart shows 172

1 cases of asthma per 100,000, where in the San
2 Joaquin Valley only 139 per 100,000.

3 HEARING OFFICER WILLIAMS: I would just
4 add for the record that Mr. Benelli is speaking
5 about the chart that the Applicant provided to the
6 Committee and participants today, and it's a chart
7 entitled "Summary of PM-10 Construction Monitoring
8 Required by the CEC".

9 And staff addressed the chart earlier
10 and objected on the basis that it hadn't had a
11 chance to review the accuracy of the data in the
12 chart.

13 MR. BENELLI: So I question the accuracy
14 too.

15 My name is James Benelli, I'm from
16 Fresno County. I'm an interested person because I
17 have two grandchildren who have asthma. We live
18 in this polluted, putrid San Joaquin Valley. It's
19 a bowl-shaped valley, enclosed on every side with
20 mountains.

21 We flew up this morning, and when we
22 left this morning the wind was calm and the
23 ceiling was 700 feet. That ceiling, and the
24 prevailing inversion layer, clamps the lid on this
25 basin much like a tupperware container.

1 Of course fireplace use is prohibited.
2 The air quality is reported every morning with the
3 temperature. It's unhealthy almost every day, it
4 was unhealthy today. The smoke can't be blown
5 out, there is no wind. People who live here have
6 a three times higher asthma rate than people
7 living in clean air.

8 Just consider adding more pollution to
9 this bowl with the tupperware lid. Who would even
10 consider adding to this mess? Calpine would.
11 People buy electricity; it's big bucks.

12 I want to quote the Fresno Bee last
13 Friday, "the valley seeks extreme air
14 designation." The valley seeks extreme air
15 designation? Can you imagine? Sure, we can't
16 clean it up.

17 This moves federal intervention to 2010.
18 This gives you a chance to sneak in another power
19 plant. You tell us it's okay to build this plant
20 because you bought credits from Kern County
21 polluters who cleaned up their act, and they have
22 credits to sell.

23 This system stinks, and can only move
24 pollution. We would be stupid and naive not to
25 know that this system has the potential for graft,

1 bribes, and payoffs. One source cannot begin to
2 pollute just because another has stopped
3 polluting. One illegal act cannot be justified by
4 a legal act.

5 Let's consider for just one moment I
6 drive my car for one year and do not even get a
7 ticket from the police. Can I then sell this
8 attaboy pin I wear on my lapel to my neighbor, who
9 has just got his third DUI? Is there really a get
10 out of jail free card? Of course not.

11 Each act, and each individual, must
12 stand alone. Do not allow any polluting plant to
13 be built in the San Joaquin Valley. Please do not
14 allow this plant to go ahead. Thank you.

15 HEARING OFFICER WILLIAMS: Thank you,
16 sir. Does that conclude your comments?

17 MR. BENELLI: That concludes my
18 comments.

19 HEARING OFFICER WILLIAMS: Okay. Ma'am?
20 Mr. Sarvey?

21 MR. SARVEY: Thank you, Major. First I
22 wanted to address the use of pre-1990 ERC's in
23 this project, and my reading of the evidence
24 indicates that Mr. Haber has testified that the
25 San Joaquin Valley Air Pollution Control District

1 must retire other surplus ERC's in its credit bank
2 in order to use the pre-1990 ERC's proposed for
3 this project.

4 Well, to me that's uncontroverted
5 evidence of the worthless nature of the emission
6 reduction credits proposed for this facility, and
7 their insignificant value in mitigating the local
8 impacts from this facility.

9 While the approach of retiring
10 additional ERC's from the San Joaquin Valley Air
11 Pollution Control District's credit bank may
12 satisfy the requirement of the district's
13 attainment plan, it does nothing to mitigate the
14 significant impacts on local air quality on the
15 minority population in the project.

16 I don't understand why staff continues
17 to consider pre-1990 ERC's as CEQA mitigation.
18 Obviously, even the EPA does not even allow them
19 as a bona fide credit for the attainment plan of
20 the districts, which in my opinion renders each
21 credits worthless.

22 Now, this is essentially a pervasive
23 pattern that's going on throughout the valley.
24 Recently Calpine themselves certified a project
25 where 67 percent of the entire ERC package was

1 pre-1990, and that was the East Altamont Energy
2 Center.

3 And I object strenuously to the use of
4 these ERC's. They are worthless. And I think
5 that's an important thing that the staff needs to
6 recognize, and to reject any use of these types of
7 ERC's.

8 Another issue that I'm concerned with in
9 this project is that the ammonia slip is being
10 allowed to be admitted at ten PPM. This is not
11 the current standard for what's going on around
12 the country.

13 And staff themselves, this is kind of a
14 departure from what they've been presenting in
15 almost any other siting case. They've been
16 advocating a five PPM ammonia slip, and I don't
17 understand why it's not being advocated and
18 applied here.

19 Specifically, the Tesla Project has
20 adopted a five PPM ammonia slip in conjunction
21 with a two PPM NOX limit. And also recently, the
22 Palomar decision handed down with a five PPM
23 ammonia slip.

24 There's also two projects in
25 Massachusetts that have recently been certified

1 with a two PPM ammonia slip, and a one and a half
2 PPM NOX limit. So I understand that when this
3 project was initially proposed that was state of
4 the art, but that's no longer true, as this
5 project has dragged on for a couple of years.

6 And there's two factors that are in
7 evidence now that weren't in evidence then.
8 Number one, as staff has pointed out, the San
9 Joaquin Valley APCD has requested reclassification
10 to extreme. So this is a much more problematic
11 situation at the time, and I note that local air
12 quality has been deteriorating there in the Fresno
13 area itself.

14 So this is something that needs to be
15 taken into consideration. And then the other
16 item, as I mentioned earlier, a lot of the
17 combined cycle plants that are being sited now are
18 adopting a five PPM and as low as a two PPM
19 ammonia slip. So I think it's really important,
20 because of the nature of the analysis that's been
21 performed on secondary particulate formation from
22 ammonia, is pretty limited.

23 So we really need to take a harsh look
24 at it, and need to provide as stringent a standard
25 as possible. And the other item that I'm

1 concerned with is the fact that the Applicant is
2 proposing to use the majority of their NOX offsets
3 of an ERC that's tied to another project. And
4 from the conversation that was heard here, I'm
5 hoping that this is going to come back before the
6 public, and the public's going to get an
7 opportunity to comment on this, because to me this
8 entire ERC package is deficient.

9 And that's all I have, Major. Thank
10 you.

11 HEARING OFFICER WILLIAMS: Thank you,
12 Bob, appreciate it. Next on public comment, we're
13 going to have Ms. Ramos, from the city of San
14 Joaquin.

15 MS. RAMOS: Good afternoon. Cruz Ramos,
16 City Manager for the city of San Joaquin. I come
17 personally to deliver some messages from our
18 mayor, Mayor Ramirez. She apologizes, but family
19 and travel kept her away. I also come bringing
20 some comments from a member, a coordinator, of our
21 senior group.

22 Before I read into the record Mayor
23 Ramirez' letter, I'd like to make a couple of my
24 personal comments. Being a resident of Fresno
25 County all of my very, very long years -- not

1 quite as long as yours, but almost there -- and
2 having grandchildren as well, I want to say that
3 we recognize the issues that have been raised, and
4 we acknowledge the issues.

5 But we also want you to consider the
6 fact that the situation that we have in Fresno
7 County, in the valley as a matter of fact, is not
8 something that was created just by one company,
9 and it wasn't done overnight. It's been a long
10 time in coming. And it's not going to be
11 corrected by one company not being able to
12 operate.

13 So we are here saying that the city of
14 San Joaquin supports this project for a variety of
15 reasons. And now, if you will -- I'll try and
16 summarize the Mayor's comments.

17 But basically, she urges the Commission
18 to approve the Application for Certification for
19 the San Joaquin Valley Energy Project, and to
20 grant the license to Calpine to construct and
21 operate the facility. We strongly believe that
22 this plant is going to spark the economic engine
23 for this area.

24 We have wide and varied support for the
25 project. That includes our state, local and

1 federal legislators, as well as the greater
2 Chamber of Commerce. We have the Golden Plains
3 Unified School District also supporting this
4 project. The list goes on and on and on. We also
5 have neighboring cities that support the project.

6 So thank you for your time, and thank
7 you to the staff for their efforts and their
8 diligence in pursuing this and making sure that
9 this project is going to be able to supply a
10 reliable and as clean as possible energy source
11 for our area. Thank you.

12 HEARING OFFICER WILLIAMS: And we thank
13 you, Mr. Ramos, for braving both the holiday
14 season and the weather to get up here to give the
15 city's perspective on this project. Thank you
16 very much.

17 Okay, we also have Mr. Smith. Oh,
18 okay -- she's a tough act to follow. Then we'll
19 move on. We'll close out air quality -- again
20 subject to the attempt by staff and the Applicant
21 to provide further documents that the Committee
22 needs.

23 Public health is our next topic, and
24 there are minor changes that Applicant proposed,
25 on page 187 of the Decision, of the PMPD. And I

1 think those are well taken, and those changes will
2 be made. And again, on the findings, findings one
3 and two, Applicant had made some suggestions for
4 minor changes.

5 Applicant, could you go over those? I
6 wasn't really sure of what you were -- I think
7 maybe it was just a word with number one. On page
8 191, the findings.

9 MR. KRAMER: It looks like maybe the
10 word "not" is missing, is that what you're saying?
11 Although there will be some release. This is just
12 talking about the potential.

13 HEARING OFFICER WILLIAMS: Okay. With
14 respect to number one you just want to add the
15 language change? Okay, that change will be made,
16 it's very minor. And your comment on item number
17 two, about the finding, we'll review it.

18 MR. HARRIS: Yes, the suggestion there
19 is that it's inconsistent with the text earlier,
20 and we're just suggesting it be deleted.

21 HEARING OFFICER WILLIAMS: Okay, we'll
22 look at that. I would note for the record that
23 Mr. Benelli is packing up, and we, again we'd like
24 to extend our appreciation to you, sir, for --

25 MR. BENELLI: Thank you. I'd like to

1 thank you for the opportunity of saying my part.
2 Again, thanks very much, and we'll keep in touch.

3 HEARING OFFICER WILLIAMS: Okay, thank
4 you. So, I think that'll do it on public health.
5 Our staff didn't have any comments.

6 Moving on to hazmat, in looking at
7 Applicant's comment, it seems that what's written
8 in the comment in exactly what appears in the
9 PMPD.

10 MR. CARRIER: That was an error. The
11 language produced is exactly what's in the
12 document. We owe you the revision on that. A cut
13 and paste error, I'm afraid.

14 HEARING OFFICER WILLIAMS: Okay, if you
15 could just get that to me, and we'll take a look
16 at it.

17 Water quality, I think, likewise there
18 are some minor comments, fixer uppers.

19 MR. KRAMER: Back to hazmat. We
20 proposed some minor changes, actually less strict
21 requirements. They're on page 205 -- well, that
22 was the narrative. And then condition haz 5. I
23 just want to note that. I presume the Applicant
24 would have no difficulty with that.

25 HEARING OFFICER WILLIAMS: Yes, those

1 will be made. And also, the Applicant had made a
2 couple of other comments on wording that we
3 thought had merit too, and those changes will be
4 made.

5 Water quality, I don't think there were
6 any areas of dispute. Again, minor recommended
7 changes that the Committee will review. And that
8 will take us up to noise. And I know that staff
9 has -- again, we've read the comments, so you
10 don't need to elaborate on it if it's in your
11 comments.

12 But if you have something that you'd
13 like to add we'll certainly consider it.

14 COMMISSIONER GEESMAN: I believe staff
15 had suggested that we consider including a
16 condition in noise that would require the
17 Applicant to implement the mitigation measures
18 offered to the owners of the surrounding
19 dwellings.

20 MR. KRAMER: Well, I'll just summarize
21 what we said in a sentence or paragraph. We're
22 not sure exactly how the decision got from point A
23 to point B, so we tried to speculate as to some of
24 the possible reasons, based on what we found in
25 the language. And we found many of those to be,

1 well, improper under the law, if that was actually
2 the motivation.

3 And -- my train is derailing -- I'll
4 stop there. But we do agree, as we've already
5 stated, that to the extent that they've offered
6 mitigation, as Commissioner Geesman just alluded
7 to, there should be a requirement in there.

8 HEARING OFFICER WILLIAMS: Well, do you
9 want to attempt to work out a condition and pass
10 it by the Applicant, and again we could --

11 MR. KRAMER: Certainly we could do that.

12 HEARING OFFICER WILLIAMS: Okay. I
13 think certainly the week before, certainly by the
14 9th we should, the Committee would look to have
15 all the comments in by the close of business on
16 the 9th.

17 MR. HARRIS: Just a point of
18 clarification, you're talking about reports on the
19 sound attenuation, the windows, and the
20 insulation, that kind of thing?

21 HEARING OFFICER WILLIAMS: Right.

22 MR. HARRIS: It seems that could easily
23 be worked into a compliance report somewhere along
24 the way. We'll work with staff to figure out a
25 place to stick it in there. We absolutely intend

1 to do that, and we have binding agreements to do
2 that. So if it's just a reporting requirement we
3 can maybe add a line to an existing condition.

4 HEARING OFFICER WILLIAMS: Okay.

5 MR. KRAMER: Well, we'd have to say to
6 that we're going to require you to do it as well
7 as report, unless you want to imply the
8 requirement from the report. I prefer to write
9 conditions that don't imply requirements from
10 requirements to report.

11 HEARING OFFICER WILLIAMS: Okay. Well,
12 see what you all can work out, you have until the
13 9th, close of business -- well, let's make it 3:00
14 p.m. on that night. And certainly to the extent
15 that you work something out and you e-mail it to
16 me.

17 MR. HARRIS: The 5th is a Monday, isn't
18 it?

19 HEARING OFFICER WILLIAMS: Uh, the 9th
20 for you all to send me whatever agreements and
21 conditions that you all have agreed on. We'll
22 extend it a bit from the 5th, out of deference to
23 the holiday.

24 MR. KRAMER: And the other part of my
25 noise summary was that the decision right now

1 talks about bits and pieces of the evidence, but
2 we think it's important to address other things
3 that we mention, like our impeachment evidence and
4 things like that, so there's a complete picture of
5 how the decision was arrived at.

6 And it goes without saying that we
7 prefer L90 and if no mitigation is to be provided
8 it be called significant, and a case be made for
9 the infeasibility of mitigation, rather than
10 getting there the other way.

11 HEARING OFFICER WILLIAMS: Okay. Duly
12 considered. Last is visual resources. I think
13 both parties had some comments?

14 MR. KRAMER: Well, I can probably short-
15 circuit this. We noted the disconnect between the
16 verification and the condition. The Applicant's
17 proposed amendments are acceptable to us, and
18 would solve all that.

19 HEARING OFFICER WILLIAMS: All right.
20 So, do we have any last minute things that we need
21 to address before we adjourn?

22 MR. HARRIS: Just maybe some
23 clarification on housekeeping. The comment period
24 closes on the 5th, and you --

25 HEARING OFFICER WILLIAMS: You have

1 until the 9th.

2 MR. HARRIS: We have until the 9th to
3 submit any joint --

4 HEARING OFFICER WILLIAMS: Right, yes.

5 And that's the week before the Business Meeting on
6 the 14th. Okay, thank you, and have a happy
7 holidays everybody.

8 (Thereupon, the hearing ended at 3:05 p.m.)

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